

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

SEP 20 2006

JOHN F. CORCORAN, CLERK
BY: *K. Dotson*
DEPUTY CLERK

UNITED STATES OF AMERICA

v.

JOEL GUILLEN-CASTELLANOS,

Defendant

CASE NO. 5:06cr00015-3

**REPORT AND
RECOMMENDATION**

By: Hon. James G. Welsh
U.S. States Magistrate Judge

The defendant having indicated an intent to change his plea previously entered in this case, reference to the undersigned, by order entered July 25, 2006, was made for the purpose of conducting a plea hearing in accordance with the provisions of Title 28 U.S.C. § 636(b)(3). The proceedings were recorded by a court reporter (*see* Rule 11(g)), and the defendant was provided with a Spanish language interpreter (*see* Rule 28).

In this case the Grand Jury previously returned a Superseding Indictment, consisting of seven counts, in which this defendant and others were charged in Count One with knowingly combining, conspiring, confederating, and agreeing with persons, both known and unknown to the Grand Jury, with knowingly and intentionally distributing and possessing with the intent to distribute, five hundred (500) grams or more, of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of

Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A), all in violation of Title 21, United States Code, Section 846. He was previously arraigned on this charge and entered a plea of Not Guilty.

The plea hearing was conducted before the undersigned on September 11, 2006. The defendant was at all times present in person and with his attorney, Jay Wilk. The United States was represented by Ray B. Fitzgerald, Jr., Assistant United States Attorney.

With the defendant's informed and written consent, the undersigned made a Rule 11 inquiry; the government presented evidence for the purpose of establishing an independent basis for the plea, and the defendant entered a plea of guilty to Count One of the Superseding Indictment.

A. DEFENDANT'S RESPONSES TO RULE 11 INQUIRY

The defendant was placed under oath and addressed personally in open court. He expressly acknowledged that he was obligated to testify truthfully in all respects under penalty of perjury and that he understood the government's right, in a prosecution for perjury or false statement, to use against him any statement that he gives under oath. *See* Rule 11(b)(1)(A).

The defendant testified that his full legal name is Joel Guillen-Castellanos, that he is twenty (20) years of age, that he went to the 9th grade in El Salvadore, and that he can

understand English only “a little.” He stated, however, that he was able to understand and participate fully in the proceedings with the assistance of the Spanish language interpreter. He denied having any medical condition, either physical or mental, which might interfere with his ability to understand and participate fully in the proceedings, and he similarly denied using any alcohol, medication or drugs which might impair his ability to understand and participate fully in the proceedings. His attorney, upon inquiry, represented that he had no reservations about the defendant’s competency to change his plea and to enter a plea of guilty.

After expressing his understanding of his right to have this proceeding conducted before a United States district judge, the defendant expressly consented to proceed with this hearing before the undersigned magistrate judge. After the requisite waiver form was translated and read to the defendant, it was executed by him and filed as part of the record.

The defendant testified that he had discussed the charge with his attorney, that he had previously received a copy of the Superseding Indictment against him, and that the charges against him in the Indictment had been fully translated and read to him. He testified that he understood each of the charges against him, and he understood that each was a felony. *See* Rule 11(b)(1)(G). He testified that he had been given adequate time to prepare any defenses he might have to the charges contained in the Superseding Indictment, that he was fully satisfied with the services of his attorney, and that it was his intention and desire to change his prior plea and to enter a plea of guilty to the charge against him in Count One.

The attorney for the government informed the court that the defendant's proposed plea was to be made pursuant to a written plea agreement, and the government's understanding of the plea agreement was then stated in some detail, including *inter alia* the government's agreement to permit the defendant to plead guilty to the offense charged in Count One(¶ 2), the government's agreement to request dismissal the remaining counts as to him upon the court's acceptance his guilty pleas (¶ 3), the terms of the sentencing recommendation (¶ 6), the terms of any evidence proffer (¶ 7), the defendant's obligation to provide a financial statement (¶ 8), the defendant's waiver of his right to appeal any sentence and waiver of his right to jury determination of any guidelines issues (¶ 9), the defendant's waiver of any right to make any 28 U.S.C. § 2255 attack on the judgment or any part of the sentence in this case (¶ 10), and the substance of the terms set forth in paragraphs numbered 4, 5 and 11 through 21 of the plea agreement.

After which, the defendant confirmed that his understanding of the plea agreement was the same as that set forth by the government's attorney. The defendant's attorney then represented that his understanding of the terms of the plea agreement was also the same, that he had reviewed it in detail with his client, and that he was satisfied the defendant understood its terms.

Upon further inquiry, the defendant responded that no one had made any other,

different or additional promise or assurance of any kind in an effort to induce him to enter a plea of guilty in this case and that no one had attempted in any way to force him to plead guilty. *See* Rule 11(b)(2). The defendant was then shown the original of the plea agreement, and he affirmed it to be his signature on the document.

The pleas agreement was then filed and made a part of the record, and the undersigned noted for the record that the written Plea Agreement constituted the best statement of its terms, and as such it “speaks for itself.”

The defendant expressly acknowledged that he was proposing to enter a plea of guilty to the charge contained in Count One of the Indictment, to-wit: the defendant proposed to enter a plea of guilty to the offense of conspiring to knowingly and intentionally distribute, and possess with intent to distribute, five hundred (500) grams or more grams of a substance containing a detectable amount of methamphetamine in violation of Title 21, United States Code, Section 846.

After the attorney for the government informed the defendant of the mandatory minimum penalty provided by law for this offense set forth in Count One, the defendant acknowledged unequivocally that he understood ten (10) years imprisonment ¹ to be the

¹ Defendant was also informed that he could be sentenced to less than ten years imprisonment if the government makes a motion pursuant to Title 18, United States Code, Section 3553(e) on his behalf, or if he qualifies for the “Safety-Valve” set forth in Title 18, Section 3553(f).

mandatory minimum penalty which the court would be required to impose if his plea of guilty was accepted to the offense charged in Count One, *See* Rule 11(b)(1)(I). The attorney for the government further informed the defendant of the maximum possible penalty provided by law for the offense charged in Count One of the Indictment, and the defendant expressly acknowledged that he understood the maximum possible penalty provided by law for conviction of the offense charged in Count One of the Superseding Indictment to be confinement in a Federal penitentiary for the remainder of his life without the possibility of parole and a \$4,000,000.00 fine. *See* Rule 11(b)(1)(H). In addition, the defendant was informed, and he then expressly acknowledged, that any period of incarceration on this offence must be followed by a five-year period of supervised release and /or his deportation to his home country.

The defendant testified that he knew that his plea, if accepted, would result in him being adjudged guilty of the offense and that such adjudication may deprive him of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any kind of firearm.

The defendant was informed, and he expressly acknowledged, that the court's determination of his sentence would include consideration of multiple factors, including: the nature and circumstances of the offense; the defendant's history and characteristics; the seriousness of the offense; the need to promote respect for the law; the need to provide for just

punishment and afford adequate deterrence; the need to protect the public; any determined need to provide the defendant with educational or vocational training, medical care or other correctional treatment in the most efficient manner; the kinds of available sentences; the pertinent sentencing guidelines and policy statements; the need to avoid unwanted sentence disparities; and the need to provide restitution. He acknowledged that he understood that the court may order him to make full restitution to any victim and may require him to forfeit certain property to the government. See Rule 11(b)(1)(J)–(K). He also stated that he knew that he would be required to pay the mandatory One Hundred Dollar (\$100.00) special assessment. See Rule 11(b)(1)(L).

He testified that he and his attorney had talked about how the Sentencing Commission Guidelines might apply to his case, including the obligation of the court to consider these Guidelines and the court's discretion to depart from them under certain circumstances and in accordance with applicable court decisions. See Rule 11(b)(1)(M); *United States v. Booker*, 543 U.S. 220 (2005). In addition, the defendant acknowledged that he understood the court would not be able to determine the recommended guideline sentence for his case until after the pre-sentence report had been completed and he and the government each had an opportunity to challenge the facts reported by the probation officer. He acknowledged that he understood, irrespective of any sentence imposed by the court, he would have no right to withdraw his plea of guilty. He acknowledged his understanding that he would be bound by his guilty plea, and could not withdraw it, even if the sentence he received was more severe

than he expected or if the court did not accept the government's sentencing recommendation. Likewise, he acknowledged that he knew parole had been abolished, that he would not be released on parole, that any sentence of imprisonment may also include a term of "supervised release," and that any violation of the terms and conditions of supervised release could result in his return to prison for an additional period of time.

The defendant also expressly stated that he understood the government had the right to seek forfeiture (*see e.g.* 18 U.S.C. § 981(a)(1)(C) and 21 U.S.C. § 853(p)); that he understood he would have no right of appeal in forfeiture of property order (*see Austin v. United States*, 509 U.S. 602 (1993)); that he understood by pleading guilty to the said Count One offense he was waiving his right to have a jury determine beyond a reasonable doubt the facts alleged therein, including those related to sentencing; that he understood, pursuant to the plea agreement (§ 9), he was waiving his right to appeal his conviction and/or any sentence of the court within the guideline range on the ground that it was unreasonable; and that he understood, pursuant to the plea agreement (§ 10), he was waiving his right to challenge his conviction and/or sentence in any post-conviction proceeding.

Each of defendant's procedural rights surrendered on a plea of guilty was also explained, including: his right to persist in his previous plea of not guilty to the offense charged against him; his attendant right to a trial by jury and right to be represented and to have the assistance of counsel at trial and at every other stage of the proceeding; his right at

trial to see, to hear, to confront and to have cross-examined all adverse witnesses; his right to be protected from compelled self-incrimination; his right to testify and to present evidence in his defense; his right to the issuance of subpoenas, or compulsory process, to compel the attendance of witnesses to testify in his defense; his presumption of innocence; the obligation of the Government to prove his guilt beyond a reasonable doubt; the right on his part to decline to testify unless he voluntarily elected to do so in his own defense; and his right to have a unanimous guilty verdict. *See* Rule 11(b)(1)(B) – (E). The defendant testified that he understood his right to persist in his plea of not guilty and the attendant rights that he would waive upon entry of a guilty plea. *See* Rule 11(b)(1)(F).

He stated that he understood his plea of guilty would be an admission of all of the elements of a formal criminal charge, and he testified that he was pleading guilty because he was in fact guilty of the crime charged Count One of the Superseding Indictment.

In response to further questioning to ensure that his proposed plea was voluntary, the defendant again stated that (other than the promises expressly set forth in the written plea agreement) his plea did not result from any force, threats, or promises of any kind (*see* Rule 11(b)(2), that his decision to plead guilty was in fact fully voluntary on his part, and that it was being made with the advice and assistance of counsel.

To permit the court to determine that an independent factual basis existed for the plea,

counsel for the government presented the sworn testimony of the case agent, ATF Special Agent John Dodson, He testified that his investigation developed evidence that beginning in December 2005 the individuals named in the indictment, including specifically the defendant, engaged in the receipt, use, and distribution (to third parties) of methamphetamine. In addition, SA Dodson testified in some detail concerning the nature and scope of the conspiracy, the defendant's participation, the quantity of methamphetamine involved.

Both the defendant and his counsel agreed with the accuracy of the facts presented by the government. In response to a further inquiry by the undersigned, the defendant represented that he had heard and understood all parts of the proceeding and that he still wished to plead guilty.

After consultation with his attorney, the defendant waived a reading of the Indictment and entered a plea of GUILTY to the offence charged in Count One of the Superseding Indictment which alleged his violation of Title 21, United States Code, Section 846. After the requisite form was translated and read to the defendant, the guilty plea form was executed by the defendant and filed as part of the record.

After entering his plea as aforesaid, after an independent basis for the plea was established and after being informed that the undersigned would recommend acceptance of his aforesaid plea, the defendant stated that he was fully satisfied with his attorney's advice,

assistance and services. He further stated that he was “very sorry for what [he] had done, and that he sincerely apologized “to [his] mother, to the court, and to the entire government of the United States for what [he] had done.”

At the conclusion of the hearing, the defendant was remanded to the custody of the United States Marshal, pending completion of a pre-sentence report.

B. GOVERNMENT’S EVIDENCE

ATF Special Agent John Dodson testified that, based on information developed as part of his professional duties and beginning at least in December 2005, the defendant, and others were methamphetamine users and were being supplied by one Juan Castendeda-Renteria, a co-defendant and co-conspirator. His investigation, including *inter alia* witness interviews and surveillance, established that the other named co-defendant’s took telephone calls for methamphetamine orders and made related deliveries. On January 13, 2006, the defendant personally made a delivery of more than 50 grams of methamphetamine, and he was subsequently present at the time of a delivery on January 15, 2006. During the course of SA Dodson’s investigation, 17 ounces (between 480 and 500 grams) of methamphetamine was either purchased or seized, and testimony from multiple customers to whom the co-conspirators sold methamphetamine would be available at a trial to prove additional drug-weight amounts. SA Dodson also testified that no evidence was developed to indicate that the defendant ever had a firearm, and he testified that laboratory test results had confirmed the

presence of methamphetamine and the drug weight amounts supporting the charge.

C. FINDINGS OF FACT

Based on the evidence, representations of counsel, and defendant's sworn testimony presented as part of the Rule 11 hearing, the undersigned submits the following formal findings of fact, conclusions and recommendations:

1. The defendant is fully competent and capable of entering an informed plea;
2. The defendant is fully aware of the nature of the charge and the consequences of his plea;
3. The defendant is fully informed, and he understands, the enumerated items set forth in Rule 11(b)(1)(A) – (N);
4. Before entering his plea, the defendant and the government reached a plea agreement which was reduced to writing;
5. Defendant's entry into the written plea agreement and his tender of a plea of guilty to the charge contained in Count One were both made with the advice and assistance of counsel;
6. The defendant's entry of a plea of guilty to the felony charge of participating in a criminal conspiracy for the purpose of possessing with intent to distribute and distributing 500 grams or more of a substance containing methamphetamine set forth in Count One of the Superseding Indictment was made with knowledge and an understanding both of the nature of the offense and the full range of punishment which might be imposed;
7. The defendant's plea of guilty is fully voluntary and did not result from any force, threats, or promises other the one promise contained in the plea agreement;
8. The plea agreement complies with the requirements of Rule 11(c)(1); and
9. The evidence presents an independent basis in fact containing each essential

element of the offense to which the defendant is pleading guilty.

D. RECOMMENDED DISPOSITION

Based on the above findings of fact, the undersigned RECOMMENDS that the court accept defendant's plea of guilty to the aforesaid charge in Count One of the Indictment, that the defendant be adjudged guilty of that offense, that a sentencing hearing be scheduled by the presiding District Judge on December 4, 2006 at 10:30 a.m..

E. NOTICE TO PARTIES


Notice is hereby given to the provisions of 28 U.S.C. § 636(b)(1)(c). Within ten (10) days after being served with a copy of this Report and Recommendation, any party may serve and file written objections to such proposed findings and recommendations as provided by the rules of court. The presiding District Judge shall make a *de novo* determination of those portions of the report or specified findings or recommendations to which objection is made. The presiding District Judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the undersigned. The presiding District Judge may also receive further evidence or recommit the matter to the undersigned with instructions.

Failure to file timely written objections to these proposed findings and recommendations within ten (10) days could constitute a waiver of any right to appellate review. At the conclusion of the ten-day period, the Clerk is directed to transmit the record

in this matter to the presiding United States District Judge.

The clerk is directed to transmit copy of this Report and Recommendation to all counsel of record.

DATED: 20th day of September 2006.


James G. Welsh
United States Magistrate Judge